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TOWARD A QUALITY POPULATION: CHINA'S EUGENIC STERILIZATION OF THE MENTALLY RETARDED

I. INTRODUCTION

In the late nineteenth and early twentieth centuries, the idea of a higher quality human race was popularized among some scientists who believed that certain genetic traits were passed down through generations.¹ They theorized that procreation by those with superior traits would produce superior offspring.² The unfortunate corollary to this idea was that those displaying less desirable traits would infect generations to come.³

Over the years, eugenics, the name given to this quasi-scientific movement, has had a particularly large impact on the mentally retarded. While the concept of eugenics has fallen into disrepute in the West, eugenics has gained credit in the People's Republic of China's ("China").⁴ Rural provinces have instituted policies of sterilizing the mentally retarded and a new national marriage law imposes severe birth restrictions under the premise of eliminating the burden the mentally retarded place on society.⁵ Increasing the population quality appeals to the Chinese government, because it supplements the government's current controls on population quantity.⁶

The United States has had its own infamous period of endorsing eugenic sterilization. In the 1927 Supreme Court case *Buck v. Bell*, 274 U.S. 200 (1927), Justice Oliver Wendell Holmes characterized the prevailing frustrations when he ordered the involuntary sterilization of Carrie Buck, proclaiming that "three generations of imbeciles are

1. See generally Howard Markel, *The Stigma of Disease: Implications of Genetic Screening*, 93 AM. J. MED. 209 (1992).

2. See generally *id.*

3. See generally *id.*

4. Nicholas D. Kristof, *China's Provinces Limit Reproduction of Retarded to Improve Population*, N.Y. TIMES, Aug. 18, 1991, at A18 [hereinafter *China's Provinces*].

5. *Id.*

6. *Id.*

enough."⁷ At the time, the prevalent feeling in the United States was that the social ill of mental retardation could be cured if the retarded could not procreate. Thus, retardation could be subdued or extinguished.

Since the days of *Buck*, American judicial and public views about the mentally retarded have become enlightened. The eugenic movement in Nazi Germany portrayed the violative and fallacious nature of creating a master race, and abruptly ended further Western reliance on the theory of strengthening the gene pool⁸ by limiting procreative rights of the mentally retarded.

This Note discusses the problem of mental retardation in China and the Chinese government's postulation of eugenics laws designed to enhance the population quality. As the issue is an integral subsection of the broader population problem, Part I will also address China's attempts to control the population by incentives such as the "one-child" policy.

Parts II and III describe the problem of China's high rate of mental retardation in its rural areas. This part will also discuss the eugenics laws designed to combat the social effects of retardation, the problems with these laws, and the reasons why they are accepted.

Part IV briefly describes the history of eugenics in the United States. Part III discusses the evolving views of population quality and treatment of the mentally retarded from the 1930s eugenics movement to the present-day focus on individual rights. This part will also present an overview of some modern substantive and procedural standards in the United States, Canada, and England, which hold enlightened views about the balance between the individual and the state.

Finally, Part V discusses population activity sanctions imposed on China by the United States and the current administration's efforts to halt violations of human rights.

II. THE CHINESE POPULATION POLICY

The increasing growth in world population presents potentially devastating economic and ecological consequences.⁹ Thus, many nations

7. *Buck v. Bell*, 274 U.S. 200 (1927).

8. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1202, 1249 (1990).

9. See, e.g., Robert S. McNamara, *Time Bomb or Myth: The Population Problem*, 62 FOREIGN AFF. 1107, 1107-08 (1984); see also JOHN KING FAIRBANK, *THE UNITED STATES AND CHINA* 21 (1980).

have developed policies aimed at decreasing the growth rate of their populations.¹⁰ China's one-child policy, one of the first, remains one of the most stringent population control policies.¹¹ By Western standards, the policy is an obvious infringement upon personal rights.¹² However, the policy has achieved a remarkable impact upon the world population growth rate.¹³ In 1984, the population growth rate decreased for the first time, due largely to the impact of China's decrease.¹⁴ Fifteen other countries in the region now have official policies aimed at decreasing their population growth rate.¹⁵

China, however, did not always view overpopulation negatively. Mao Zedong, who came to power in 1949, declared that the concept of overpopulation was a "capitalist myth" designed to subjugate developing countries.¹⁶ His policy, based on the Marxist theory that a person could produce more than he could consume, was to encourage population growth by instituting a system of incentives for government workers to bear more

10. James H. Scheuer, *China's Family Planning and the U.S.*, N.Y. TIMES, Jan. 24, 1987, at 27. Efforts are underway in the poor nations of sub-Saharan Africa, Bangladesh, and Haiti where rampant population growth is causing devastating poverty, disease, and starvation. *Id.*

11. See Jennie A. Clarke, Note, *The Chinese Population Policy: A Necessary Evil?*, 20 N.Y.U. J. INT'L L. & POL. 321 (1987). The first one-child policy was espoused by Deng Xiaoping in 1978 with the implementation of the "Four Modernizations" campaign. The Four Modernizations are agriculture, industry, national defense, and science and technology. The program is a plan to modernize these areas by the year 2000. FRANCES BUTTERFIELD, CHINA: ALIVE IN THE BITTER SEA 262, 278-279 (1982). See *infra*, text accompanying notes 16-52 for a discussion of the one-child policy.

12. See *infra* text accompanying notes 176-179 for further discussion about Western views on the situation in China.

13. Robert Schiffer, *A Wrong Signal on Birth Control*, N.Y. TIMES, June 21, 1985, at A29 (Robert Schiffer is a former State Department and U.N. official). The annual world population increase in 1984 was 1.7%, down from 1.8% in 1983. China's birth rate fell to 27 per thousand in 1985 from 29 per thousand in 1983. *Fall in World Birth Rate Since 1983 Is Reported*, N.Y. TIMES, Apr. 8, 1985, at A7.

14. Schiffer, *supra* note 13.

15. Stephen L. Isaacs, *Reproductive Rights 1983: An International Survey*, 14 COLUM. HUM. RTS. L. REV. 311, 317 (1983). The fifteen countries are: People's Republic of China, South Korea, Indonesia, Philippines, Thailand, Vietnam, Bangladesh, India, Pakistan, Nepal, Sri Lanka, Papua New Guinea, Fiji, Tonga, and Samoa. *Id.* at n.39.

16. See, e.g., JOHN COOPER ET AL., HUMAN RIGHTS IN POST-MAO CHINA 30 (1985) [hereinafter POST-MAO CHINA]; MAO ZEDONG, *The Bankruptcy of the Idealist Conception of History*, in SELECTED WORKS OF MAO ZEDONG 451, 451-54 (1967); Schiffer, *supra* note 13.

children.¹⁷ Consequently, as a result of this and other birthrate increasing policies, a population boom resulted between 1963 and 1972.¹⁸

Responding to the population boom, Deng Xiaopeng introduced significant incentives in 1978 to decrease China's population.¹⁹ However, these incentives were insufficient in outlying, rural areas where there was still a great need for children who could work the land.²⁰ Thus, violations of the policy occurred.²¹

In 1979, the Government adopted a two-stage plan: (1) to decrease the rate of population growth from 1.2% to 0.5% in 1985; and (2) to decrease the population growth rate to zero by the year 2000.²² The plan first called for the decrease, and eventual elimination, of three-child families, and the increase of one-child families, until they became the norm.²³ Currently, one-child families are required, not simply encouraged.²⁴ There are, however, a number of exceptions.²⁵

17. POST-MAO CHINA, *supra* note 16, at 30; *Evolution of the Family Planning Policy, CHINA RECONSTRUCTS* 13 (May 1986); Hou Wenruo, *Population Policy, in CHINA'S POPULATION* 55, 58 (1981).

18. *See generally* Clarke, *supra* note 11, at 329.

19. POST-MAO CHINA, *supra* note 16, at 30. Mao's policy introduced salary bonuses, education benefits, and housing privileges to couples who signed one-child pledges or who had only one or two children. *Id.*

20. *Id.*

21. Clarke, *supra* note 11, at 330. Violations of the policy resulted in severe discrimination in jobs, housing, education, and food and medical allowances. POST-MAO CHINA, *supra* note 16, at 31. Maternity leaves were not granted after the first child. *Id.* Food and medical allotments were given for only one or two children. *Id.* Pay cuts were instituted for those who had more than one child. *Id.*

22. Kuan I. Chen, *China's Population Policy*, CURRENT HIST. 253 (Sept. 1982). The Central Committee of the Chinese Communist Party decided to promote the one-child policy in mid-or late 1978. Model Regulations were distributed to provincial leaders to be used as guides in formulating policies adapted to the circumstances in the particular province. JAMES BANISTER, *CHINA'S CHANGING POPULATION* 136, 184 (1987).

23. Chen, *supra* note 22, at 253. The statistics for 1978 indicated that the elimination of third births would decrease the population growth rate to 0.7% by 1985, while the decrease of second births would lower to 0.5%. *Id.*

24. Clarke, *supra* note 11, at 331. This policy was adopted at the third session of the Fifth National People's Congress. Chen, *supra* note 22, at 254.

25. *Chinese Ease One-Child Rule*, N.Y. TIMES, May 22, 1986, at A13. Couples could be exempted from the policy if another child was essential for running a farm or fishing operation, if both parents were only children, if the couple lived in a remote area, or if the first child suffered from birth defects. *Id.* In May 1986, Guangdong Province's People's Congress announced its own exemptions from the one-child rule for urban couples whose first child was disabled by accident or non-genetic disease, for couples who

A notable exception is where countryside peasants are allowed a second child if the first one is a girl.²⁶ The rules are somewhat looser in minority areas.²⁷ According to statistics, the population growth rate dropped dramatically in the early years of the current population policy, but have been on the rise in the last few years²⁸ because of the failure to comply with the Government's policy and the exemptions allowed under the policy.²⁹ Today, the family planning controls, while still rigorous, have been somewhat moderated due in part to international criticism.³⁰ While urban families have been more compliant than their rural counterparts,³¹ the average number of children per family is actually 2.4.³² The official policy had been to meet a target of 1.2 billion people in the year 2000.³³ However, the Beijing government now estimates that this target will be impossible to meet³⁴ and faces the challenge of reversing what they fear could be another population increase.³⁵

adopted after an incorrect diagnosis of sterility, for couples who are both only children, and for couples in which one mate worked in an underground mine for more than five years. *Id.*

26. *Population Minister Defends Abortion Policy*, BBC SUMMARY OF WORLD BROADCASTS, June 12, 1991, available in LEXIS, News Library, BBCSWB File [hereinafter *Population Minister Defends*] (interview of Peng Peiyun, Minister of the State Family Planning Commission, by Agence France Presse); see also, *Chinese Ease One-Child Rule*, *supra* note 25, at A13.

27. *Population Minister Defends*, *supra* note 26.

28. See Marshall Green, *Is China Easing Up on Birth Control?*, N.Y. TIMES, Apr. 28, 1986, at A25.

29. Nicholas D. Kristof, *China's Birth Rate on Rise Again As Official Sanctions Are Ignored*, N.Y. TIMES, Apr. 21, 1987, at A1 [hereinafter *China's Birth Rate*]. There is, however, some indication that the more economically developed regions in South and East China have brought population growth under control. Mandatory family planning has accounted for much of the progress with a decrease from 33.43 per thousand in 1970 to 18.24 in 1992. *China: Populace Growth Tapers Off*, March 2, 1994, Reuter Textline, available in LEXIS, News Library, TXPRIM File [hereinafter *Population Growth*].

30. *Id.*

31. Scheur, *supra* note 10.

32. Kristof, *supra* note 29.

33. *Id.*

34. *Population Growth*, *supra* note 29. A China Statistics Bureau report estimates a total population of 1.202 billion by the end of 1994. *Id.*

35. *Id.* Certainly, efforts to limit the number and increase the "quality" of the mentally handicapped population are examples of the kinds of measures the government is willing to employ. *Chinese Provinces*, *supra* note 4.

Justifications for the Population Policy

China's large and concentrated population has an overall negative effect on its economy.³⁶ Concern over these effects are at the heart of China's justifications for its policies.³⁷ The focus is primarily on improving social and economic welfare.³⁸ The justifications advanced stem from the desire to improve: the economy, the quality of education, maternal and infant health, the rural response to the policy, and the environment.³⁹

In 1978, the Chinese government maintained that a rapid increase in population would be detrimental to the rate at which per capita income could be increased.⁴⁰ The national goal is to attain a per capita gross national product of \$1000 (US) by the year 2000.⁴¹ A high birth rate naturally strains China's ability to meet this goal.

Additionally, arable land is in short supply.⁴² Almost every inch of land is already cultivated.⁴³ The situation is exacerbated by Chinese entrepreneurs in the Southern and Coastal areas who, in the race for personal prosperity under economic reforms, are developing the remaining agricultural lands for transportation and industrial uses.⁴⁴ Artificial means are being used to maximize farmland, but Chinese and Western scientists are concerned about the reduction in soil quality and the future ability of the world's most populous country to feed itself.⁴⁵

36. *China's Birth Rate*, *supra* note 29.

37. *Id.*

38. See Isaacs, *supra* note 15, at 319-20 (discussing the state interests involved in family planning).

39. Clarke, *supra* note 11, at 333-40.

40. See BUTTERFIELD, *supra* note 11.

41. *Id.* at 278; Chen, *supra* note 22, at 253. Disparities exist between prosperous eastern coastal areas and lagging western regions. For example, in 1991 Shanghai's per capita gross domestic product was 6,675 yuan (about \$1300) while Guizhou's was only 890 yuan (about \$170). *Still a Low-Income Developing Country—Official*, Xinhua News Agency, July 7, 1993, available in LEXIS, News Library, TXINHU File [hereinafter *Developing Country*].

42. *Population Minister Defends*, *supra* note 26, at 2; see also *Note, The Chinese Population Policy*, *supra* note 11, at 334.

43. *Population Minister Defends*, *supra* note 26, at 2.

44. Patrick E. Tyler, *Nature and Economic Boom Devouring China's Farmland*, N. Y. TIMES, Mar. 27, 1994, at 1.

45. *Id.*

The shortage of funds for education is also a concern.⁴⁶ Only 1.4% of China's population is college educated and illiteracy among adults is close to 16%.⁴⁷ The Government posits that increasing numbers of children will strain its ability to provide basic education.⁴⁸ Furthermore, maternal and infant health care is often cited to justify the need for family planning programs, including the use of contraceptives and abortions.⁴⁹ The government claims that better health care will be possible, given the limited amount of funds available.⁵⁰

In 1979, the government set forth an additional justification for the population policy, positing that overpopulation would cause damage to the environment.⁵¹ Overpopulation disrupts the ecological balance, causes increased pollution, and depletes natural resources.⁵²

Finally, the government believes that resistance to the one-child policy can be overcome in rural areas, where non-compliance is most severe, by a more stringent population policy.⁵³ Over seventy percent of the population lives in rural areas, where the population growth rate is higher than in urban areas.⁵⁴ The urban response is greater because the people reap more government benefits and the effects of overpopulation are more apparent.⁵⁵ In contrast, rural dwellers are at a disadvantage because they must forego the potential productivity of having additional children.⁵⁶

III. MENTAL RETARDATION PROBLEMATIC IN CHINA

Subsumed within China's overall problem of overpopulation is the problem of an increasing number of births with congenital defects⁵⁷ and hereditary diseases.⁵⁸ Statistics show that China has fifty-one million

46. Clarke, *supra* note 11, at 335.

47. *Developing Country*, *supra* note 41.

48. Chen, *supra* note 22, at 252; *see also* BUTTERFIELD, *supra* note 11, at 196-98.

49. *See* Isaacs, *supra* note 15, at 319.

50. Clarke, *supra* note 11, at 340.

51. J. AIRD, COERCION IN FAMILY PLANNING: CAUSES, METHODS, AND CONSEQUENCES, *reprinted in* 131 CONG. REC. S7736-02 (daily ed. June 7, 1985).

52. *Id.*

53. Chen, *supra* note 22, at 253.

54. *Developing Country*, *supra* note 41.

55. Clarke, *supra* note 11, at 341.

56. *Id.* at 341.

57. Congenital defects are those that exist from the time of birth but are not hereditary.

58. *Law of Eugenics Advocated for China*, Xinhua Gen. Overseas News Serv., Apr.

disabled people, of whom ten million, or twenty percent, have congenital deformities or defects.⁵⁹ Nearly half of the ten million mentally-retarded people were handicapped at birth.⁶⁰

The problem of mental retardation is most severe in China's rural areas.⁶¹ For instance, in parts of the Liaoning province, mentally retarded children account for at least eight percent of the total children population.⁶² In the Yunnan province, forty-four children per thousand are disabled in vision, hearing, speaking ability, intelligence or physique, and among those, thirty-five per thousand are mentally disabled.⁶³ Likewise, in the Guangxi Zhang region, forty-three children per thousand are disabled, among whom thirty-seven percent are mentally retarded.⁶⁴

The high rates of mental retardation in the rural regions have been attributed to a number of factors. One factor is inbreeding.⁶⁵ Since many rural regions contain traditionally close-knit societies, potential marriage partners generally live within a range of twenty-five kilometers (fifteen miles) of each other.⁶⁶ In some cases, this results in marriages between close relatives, which, in turn, is responsible for so many mentally-retarded children.⁶⁷

Another factor causing high rates of retardation is congenital hypothyroidism.⁶⁸ The disease is caused by an insufficient intake of

22, 1989, available in LEXIS, News Library, ALLNWS File.

59. *Id.*

60. *Id.*

61. *Farmers Encouraged to Widen Scope of Selecting Spouses*, Xinhua Gen. Overseas News Serv., June 2, 1989, available in LEXIS, News Library, ALLNWS File [hereinafter *Farmers Encouraged*]. According to Gao Caiqin, a sociologist and director of the Heilongjiang Provincial Institute of Marriage and the Family, "anyone who often visits China's rural areas will find that the percentage of mentally retarded people in the rural areas is much higher than in the urban areas." *Id.*

62. *Mentally Retarded Children in Countryside—Too Many*, Xinhua Gen. Overseas News Serv., Jan. 12, 1989, available in LEXIS, News Library, ALLNWS File [hereinafter *Mentally Retarded Children*].

63. *Minority Children Said To Be Suffering*, Xinhua Gen. Overseas News Serv., July 24, 1989, available in LEXIS, News Library, XINHUA File.

64. *Id.*

65. *Farmers Encouraged*, *supra* note 61.

66. *Id.*

67. *Mentally Retarded Children*, *supra* note 62.

68. *Experience in Neonatal Screening for Congenital Hypothyroidism*, CHIN. MED. J., Mar. 1993, available in LEXIS, Medline Library, MEDLINE File.

iodine, which is required for physical and mental development.⁶⁹ Congenital hypothyroidism is epidemic in rural areas where the soil has a lower than normal iodine content, and the rate of retardation among children in those areas is as high as seventeen percent.⁷⁰ Areas with high rates of congenital hypothyroidism, or "swollen neck" as it is known to the Chinese, are usually poverty-stricken and have poor educational facilities.⁷¹

Finally, hereditary diseases and maternal diseases during the gestational period also contribute to the number of babies born with congenital defects.⁷² Each year, approximately 380,000 more babies are born with congenital defects on China's mainland.⁷³

A. China's Marriage Laws and the Retarded

In order to deal with the problem of couples whose offspring are likely to have hereditary diseases, China's marriage law does not allow those who are collateral relatives within three generations, or who are both seriously or mentally retarded, to get married.⁷⁴ Prior to marriage, medical authorities encourage engaged couples to consult doctors for an examination to help determine whether they are unsuitable for marriage under the law.⁷⁵ A recently passed national marriage law delineates what constitutes a marriage between people with hereditary diseases. Marriage is banned for people diagnosed with diseases that "may totally or partially deprive the victim of the ability to live independently, that are highly

69. *Mentally Retarded Children*, *supra*, note 62.

70. *Id.*

71. *Id.*

72. *Law of Eugenics Advocated for China*, *supra* note 58.

73. *Id.*

74. *Marriage Law of the People's Republic of China*, China Law Computer-Assisted Legal Research Center, Peking University, Jan. 1, 1981, available in LEXIS, Intlaw Library, CHINAL File [hereinafter *Marriage Law*]. Article six reads:

No marriage may be contracted under any of the following circumstances:

(1) If the man and the woman are lineal relatives by blood, or collateral relatives by blood up to the third degree or kinship; or

(2) If the man or the woman is suffering from leprosy, a cure not having been effected, or from any other disease which is regarded by medical science as rendering a person unfit for marriage.

See also, *Pre-marital Check-ups Encouraged*, Xinhua Gen. Overseas News Serv., Apr. 8, 1988, available in LEXIS, News Library, ALLNWS File.

75. *Pre-marital Check-ups Encouraged*, *supra* note 74.

possible to recur in generations to come and that are medically considered inappropriate for reproduction."⁷⁶ Couples whose unborn children are found to have a serious genetic defect will be consulted by a doctor, who will "give them medical advice for a termination for the pregnancy."⁷⁷

Whereas the one-child laws are aimed at reducing the size of China's population, this and other eugenics laws foreshadow China's attempt to improve population quality.⁷⁸ Indeed, the original draft of the eugenics law contained more ominous language.⁷⁹ Women with congenitally defective fetuses were to be advised simply to halt their pregnancies, and married couples with these diseases were to "have themselves sterilized."⁸⁰ The draft was criticized internationally as a racist eugenics policy akin to those pursued by Hitler.⁸¹

B. Mandatory Sterilization

Birth constraints on the mentally retarded are not new to the rural provinces. Early in 1988, the disease-plagued and poverty-stricken Gansu province passed a law that simply forbade people with severe hereditary retardation from having children.⁸²

76. *New Chinese Law Prohibits Sex-Screening of Fetuses*, N.Y. TIMES, Nov. 15, 1994, at A5 [hereinafter *New Chinese Law*]. According to the Health Minister, Chen Minzhang, a list of such diseases is forthcoming. *Id.*; Tom Post et al., *Quality Not Quantity*, NEWSWEEK, Nov. 28, 1994, at 36-37.

77. *New Chinese Law*, *supra* note 72; Post et al., *supra* note 76.

78. *Id.*

79. Yojana Sharma, *China—Human Rights: Beijing Waters Downs Eugenics Law*, Inter Press Service, Feb. 7, 1994, available in LEXIS, News Library, INPRES File.

80. *China Says New Birth Law Not Like Hitler's*, UPI, Dec. 29, 1993, available in LEXIS, News Library, UPI File.

81. *Id.*

82. *Laws Needed to Control Population Quality*, Xinhua Gen. Overseas News Serv., July 4, 1991, available in LEXIS, News Library, ALLNWS File [hereinafter *Laws*]. The rural autonomous regions are granted the power to formulate their own supplementary provisions:

Article 36. The people's congresses of national autonomous areas and their standing committees may formulate certain adaptations or supplementary provisions in keeping with the principles of this law and in the light of the specific conditions of the local nationalities in regard to marriage and family. Provisions formulated by autonomous prefectures and autonomous counties must be submitted to the standing committee of the people's congress of the relevant province or autonomous region for approval. Provisions formulated by autonomous regions must be submitted to Standing Committee of the National People's Congress for the record.

Now, the province has taken its laws a drastic step further. As the forerunner in eugenics laws, Gansu, in 1989, became the first province to approve a mandatory sterilization law for the mentally retarded.⁸³ In the first fourteen months after the law took effect, 5,500 operations were performed.⁸⁴ In one county alone, medical teams had sterilized 516 of the 700 mentally handicapped people.⁸⁵ A diagnostic network has also been established, which requires examination of all couples planning to marry.⁸⁶ And, teams have been sent to villages with large numbers of mentally retarded to "do ideological work among the relatives and guardians."⁸⁷ The goal, according to officials, is to eventually sterilize almost all of Gansu's 260,000 mentally retarded residents.⁸⁸

Other provinces have followed suit. Fujian, Guangdong, Henan, Lianoning and Sichuan, which have a combined population of 320 million, have adopted laws with provisions for eugenic controls.⁸⁹

One example of a regional eugenics law is the Sichuan eugenics law. This law states that "couples who have serious hereditary diseases, including psychosis, mental deficiency and deformity must not be allowed to bear children. Those who are already pregnant must terminate the pregnancy."⁹⁰ Other formulations appear to vary from ordering sterilization for those who intend to marry,⁹¹ to sterilization for all mentally retarded residents.⁹²

Aside from being, by Western standards, immoral and violative of human rights, the practice of eugenic sterilization is problematic because a common perception in China is that most or all mental retardation is inherited.⁹³ Specialists, however, say that most cases in China are the

Marriage Law, supra note 77.

83. *Province in China Sterilizes the Retarded*, CHI. TRIB., May 22, 1984, at C3.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Kristof, *supra* note 4.

90. *Id.*

91. *See, e.g.,* Carl Rowan, *Uncle Sam Must Leave Bedrooms*, ATLANTA CONST., Nov. 26, 1989, at G7.

92. *Laws, supra* note 82.

93. Kristof, *supra* note 4. Li Peng was quoted as saying "[m]entally retarded people give birth to idiots. They can't take care of themselves, they and their parents will suffer, and they'll be detrimental to our aim of raising the quality of people." *Id.* *Peasants*

result of poor prenatal care, birth procedures, or dietary deficiencies.⁹⁴ Commonly, an insufficient intake of iodine, which occurs frequently in impoverished areas, accounts for these diseases.⁹⁵ Sterilization and abortion will not eradicate retardation stemming from environmental factors.⁹⁶ Furthermore, even if the eugenics laws were limited to those with hereditary diseases, it would be difficult to determine whether the disease would be passed on.⁹⁷

C. China's Disposition: The Burden of the Retarded

Although not justifying China's practices, the individual's role in Chinese society helps explain the acceptance of eugenics laws.⁹⁸ Individuals have a "sense of responsibility to society and family which supersedes any perception they may have of their own personal rights."⁹⁹ Government and peer pressure play on these attitudes to help effectuate the one-child policy.¹⁰⁰ Furthermore, the Constitution stipulates that couples have a duty to practice family planning.¹⁰¹ Thus, the suppression of the individual for the good of the country is the attitude that justifies population practices.¹⁰²

The Government relies on the societal perspective to justify the eugenic sterilization laws for the mentally retarded.¹⁰³ According to Peng Peiyun, Minister of China's State Family Planning Commission, the mentally retarded are regarded as a heavy burden on their families and society.¹⁰⁴ "They can only eat, but cannot work, and they can bear children. They cannot keep themselves alive, let alone care for their

Daily, an official newspaper, expressed the view more concisely: "Idiots produce idiots." *Id.*

94. *Id.*; Arthur Caplan, *Reproductive Choices Not Job of Government*, DET. FREE PRESS, Oct. 1, 1991, at B2.

95. Post et al., *supra* note 76, at 37.

96. *Id.*

97. See generally Caplan, *supra* note 94.

98. Clarke, *supra* note 11, at 346.

99. Scheuer, *supra* note 10.

100. *Id.*

101. *Marriage Law*, *supra* note 77; see also, *Population Minister Defends*, *supra* note 26.

102. FAIRBANK, *supra* note 9, at 62-63.

103. *Population Minister Defends*, *supra* note 26.

104. *Id.*

children."¹⁰⁵ Consequently, while these laws have caused a ripple of protest abroad, there has been virtually no opposition in China.¹⁰⁶

IV. HISTORY OF EUGENIC STERILIZATION AND THE U.S. PERSPECTIVE

The United States' enlightened treatment of the mentally retarded today stands in stark contrast to China's methods. However, the evolution toward the modern standards has been gradual. Indeed, positive views about population control and the creation of a quality population are not so far in the United States' past. An examination of history gives some insight into the allure and illusion of eugenics, both abroad and in the United States.

The eugenics movement¹⁰⁷ had its roots in the seventeenth century and came into its own in the late nineteenth and early twentieth centuries as a scientific counterpart to social Darwinism.¹⁰⁸ The eugenicist's objective was to prevent the reproduction of degenerative traits, with the ultimate vision of a biologically superior mankind.¹⁰⁹ In order to accomplish this result, the eugenicist proposed segregation of inferior persons and, when necessary, their forced sterilization.¹¹⁰

By World War I, the eugenics movement had considerable success internationally.¹¹¹ In the Soviet Union, the inheritance of acquired traits was a popular theory.¹¹² In the United States, eugenicists confirmed their scientific postulations showing a relationship between race and intelligence deficiencies.¹¹³ In 1907, the first involuntary sterilization law in the United States was enacted in Indiana.¹¹⁴ The view behind its enactment

105. *Id.*

106. Kristof, *supra* note 4.

107. SEYMOUR B. SARASON & JOHN DORIS, *PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY* 210-12 (1969); *see also* Hayman, Jr., *supra* note 8.

108. Markel, *supra* note 1; *see also* Hayman, Jr., *supra* note 8, at 1249 n.253-54.

109. The fundamental tenet of the eugenics movement was that recessive genes possessing abnormal biological traits would be passed down through generations. *See* SARASON & DORIS, *supra* note 107, at 260-62.

110. *Id.* at 287-88.

111. Hayman, Jr., *supra* note 8, at 1249.

112. SARASON & DORIS, *supra* note 107, at 267-68; *see also* Hayman, Jr., *supra* note 8, at 1249.

113. Hayman, Jr., *supra* note 8, at 1249.

114. Patricia Werner, *Terminating the Rights of Mentally Retarded Parents: Severing*

was that the mentally retarded represented a menace to society.¹¹⁵ Thus, the law provided a means to carry forward the eugenic theory with respect to imprisoned, incarcerated or institutionalized individuals.

In 1927, the concept of eugenics was given a judicial blessing when the practice of sterilization was upheld by the United States Supreme Court in the case of *Buck v. Bell*.¹¹⁶ In that case, Justice Holmes upheld, under the Fourteenth Amendment, the validity of a Virginia state statute authorizing involuntary sterilization.¹¹⁷ The constitutional rights of Carrie Buck, an allegedly mentally retarded woman confined to a state colony for the feeble-minded, were swept aside in his infamous opinion.¹¹⁸

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. (citation omitted). Three generations of imbeciles are enough.¹¹⁹

Holmes' lament typified the eugenicist view that preventing certain individuals from procreating was in the state's best interest.

The practice of sterilization in the United States began to decrease when the Supreme Court in 1942 invalidated a sterilization program for prisoners who had been convicted of three felonies.¹²⁰ In 1942, only Chief Justice Harlan Stone remained on the Supreme Court out of the nine justices who had decided *Buck*. The *Skinner* Court, in great contrast to the *Buck* Court, emphasized the individual's rights: "This case touches a

the Ties That Bind, 22 J. MARSHALL L. REV. 133, 138 n.43 (1988).

115. *Id.* at 138 n.44.

116. 274 U.S. 200 (1927).

117. *Id.*

118. Susan Stefan, *Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Institutionalized, and Incompetent Women*, 13 NOVA. L. REV. 405, 414 (1989).

119. 274 U.S. at 207.

120. *Id.*; see Stefan, *supra* note 118.

sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.¹²¹ In emphasizing a difference between the inheritable nature of delinquency, which was scientifically accepted, and the tenuous and unprovable arguments about the inheritability of criminal traits, the Court, while not specifically disavowing eugenics, showed that it was uncomfortable with the practice of sterilization.¹²²

Although support for eugenics had dwindled, other state interests were later used to justify compulsory sterilization of the mentally retarded.¹²³ In the 1960s, the chief justification for compulsory sterilization was the financial burden imposed by children of mentally retarded women who were seen as promiscuous.¹²⁴ By the 1970s, the compelling state interests were held to be in preventing the birth of a normal child to an unfit parent and, “in an echo of *Buck*, an interest in preventing the birth of a predictably defective child.”¹²⁵

In the late 1960s and early 1970s, a new wave of litigation began challenging the sterilization of women who often did not consent to the procedure.¹²⁶ The litigation resulted in the repeal of many eugenic sterilization statutes.¹²⁷ However, in 1978, the Supreme Court held in *Stump v. Sparkman*, 435 U.S. 349 (1978), that a judge could order sterilization, despite the absence of an authorizing statute.¹²⁸ Since the *Stump* decision, there has been a major resurgence of sterilization cases.¹²⁹ Additionally, seven states currently have legislation that provides for involuntary or compulsory sterilization of mentally retarded people living in state institutions, and all but one provides for sterilization of people who are not institutionalized.¹³⁰

121. *Skinner v. Oklahoma*, 316 U.S. at 536.

122. Stefan, *supra* note 118, at 415-16, citing *Skinner*, 316 U.S. 535, 545-46 (Stone, C.J., and Jackson, J., concurring).

123. Stefan, *supra* note 118, at 416.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Stump v. Sparkman*, 435 U.S. 349 (1978); Stefan, *supra* note 118. Although the specific question before the Court was whether judicial immunity protected a judge from civil liability for ordering a sterilization, the Court's decision was clearly a milestone in sterilization cases, and has been cited in almost every subsequent decision on sterilization.

129. Stefan, *supra* note 11, at 418.

130. Rebecca Dick-Hurwitz, *Penry v. Lynaugh: The Supreme Court Deals a Fatal*

A. Survey of Procedural and Substantive Standards

1. United States

During the period that *Buck v. Bell* was decided, the rationale supporting sterilization was the elimination of carriers of recessive defective genes.¹³¹ Although this aim has been politically and scientifically discredited,¹³² the constitutionality of eugenic sterilization continues to be upheld.¹³³

However, since the decision in *Buck*, the Court has increasingly recognized the right to marry and have children as a fundamental right. A state must show a compelling interest in order to justify abridging that right.¹³⁴ A state's compelling interest can be found in society's interest in the reduction in human suffering, and in safeguarding the health and welfare of its citizens.¹³⁵ Thus, although compulsory sterilization of mentally retarded people still exists in the United States, the justifications for the practice have largely been altered.

In turn, the standards by which sterilization may be ordered have shifted to a paternalistic emphasis on the protection of an individual's reproductive rights¹³⁶ and the state's interest in its citizens' and that individual's welfare.¹³⁷ In *Skinner*, the first Supreme Court case to evince this change in attitude,¹³⁸ the Court engaged in strict scrutiny analysis

Blow to Mentally Retarded Capital Defendants, 51 U. PITT. L. REV. 699, (1990). ARK. STAT. ANN. § 20-49-302 (Michie 1987); CONN. GEN. STAT. ANN. § 45-78g (1981) (repealed 1986); GA. CODE ANN. § 31-20-3 (1985); MISS. CODE ANN. § 41-45-1; VT. STAT. ANN. tit. 18, § 8708 (1987); VA. CODE ANN. § 54.1-2976 (Michie 1988); W. VA. CODE § 27-16-1 (1986). Mississippi's code does not provide for those not institutionalized. MISS. CODE ANN. § 41-45-1.

131. See generally George P. Smith, *Limitations on Reproductive Autonomy for the Mentally Handicapped*, 4 J. CONTEMP. HEALTH L. & POL'Y 71 (1988).

132. *Id.* at 78. Studies have shown that the child of two heterozygous individuals only has a one in four chance of exhibiting that defective trait. *Id.*

133. *Id.*

134. *Id.*; see also *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

135. Smith, *supra* note 131, at 78.

136. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 807 (1986).

137. Joel A. Fischman, In *Re Truesdell: North Carolina Adopts Two New and Conflicting Standards for Sterilization of Mentally Retarded Persons*, 64 N.C. L. REV. 1196, 1204 (1986).

138. Kathryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV.

under the Equal Protection Clause of the Fourteenth Amendment, and held that Oklahoma's Habitual Criminal Sterilization Act was an unconstitutional deprivation of an offender's fundamental rights to marriage and procreation.¹³⁹ The Court reasoned that because of the irrevocability of sterilization, strict scrutiny was an appropriate standard of review.¹⁴⁰

In order to ensure procedural protections for sterilization proceedings, courts in states where protections are not prescribed by statute have formulated their own guidelines.¹⁴¹ In 1980, some of the most detailed guidelines were prescribed by the Supreme Court of Washington in the case of *In re Hayes*.¹⁴²

The decision can only be made in a superior court proceeding in which (1) the incompetent individual is represented by a disinterested guardian ad litem, (2) the court has received independent advice based upon a comprehensive medical, psychological, and social evaluation of the individual, and (3) to the greatest extent possible, the court has elicited and taken into account the view of the incompetent individual.

Within this framework, the judge must first find by clear, cogent and convincing evidence that the individual is (1) incapable of making his or her own decision about sterilization, and (2) unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future.

Next, it must be proved by clear, cogent and convincing evidence that there is a need for contraception. The judge must find that the individual is (1) physically capable of procreation, and (2) likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy, and must find in addition that (3) the nature and extent of the individual's disability, as determined by empirical evidence and

405 (1988). The contrast to the Holmes decision is evidenced by the *Skinner* Court's comment, "We are dealing here with legislation which involves one of the basic civil rights of man," about a state law which provided for compulsory sterilization of certain criminals. *Id.*

139. *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see also Licia A. Esposito, Note, *The Constitutionality of Executing Juvenile and Mentally Retarded Offenders: A Precedential Analysis and Proposal for Reconsideration*, 31 B.C. L. REV. 901, (1990).

140. *Skinner*, 316 U.S. 535.

141. Smith, *supra* note 131, at 79.

142. 93 Wash.2d 228 (1980).

not solely on the basis of standardized tests, renders him or her permanently incapable of caring for a child, even with reasonable assistance.

Finally, there must be no alternative to sterilization. The judge must find that by clear, cogent and convincing evidence (1) all less drastic contraceptive methods, including supervision, education and training, have been proved unworkable or inapplicable, and (2) the proposed method of sterilization entails the least invasion of the body of the individual. In addition, it must be shown by clear, cogent and convincing evidence that (3) the current state of scientific and medical knowledge does not suggest either (a) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (b) that science is on the threshold of an advance in the treatment of the individual's disability.¹⁴³

The *Hayes* guidelines are regarded as the latest in procedural "progressivism,"¹⁴⁴ and most modern laws now embody strict procedural requirements.¹⁴⁵

Modern laws also seek to impose strict, substantive requirements for court assessment.¹⁴⁶ For example, some require an inquiry into the individual's ability to reproduce¹⁴⁷ and whether sexual activity is imminent.¹⁴⁸ Additionally, some jurisdictions require proof that sterilization is a medical necessity and in the individual's physical and mental best interest.¹⁴⁹

A number of variables have been specifically held to be outside the court's allowable considerations in determining whether sterilization may be ordered. These include, *inter alia*, parental interests in seeking to prevent the child from unwanted pregnancy, or avoiding stressful situations that arise from caring for the handicapped.¹⁵⁰ Most noteworthy is the unavailability of the eugenic rationale. Sterilization may not be

143. *Id.* at 238.

144. Smith, *supra* note 131, at 80.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Scott, *supra* note 136, at 822.

imposed to protect the state from genetic and financial burdens imposed upon it by the children of retarded persons.¹⁵¹

2. Canada

In 1986, the Canadian Supreme Court held that a non-therapeutic sterilization without consent of a mentally retarded person could never safely be determined, under the court's broad *parens patriae* power (role of the state as guardian), to be for the benefit of the person.¹⁵² In the case of *Re Eve* (1987), 31 D.L.R.(4th) 1, the *guardian ad litem* (guardian appointed to defend or prosecute a suit) of a retarded woman brought an appeal to the Prince Edward Island Supreme Court for a sterilization order.¹⁵³ The court initially determined that:

While [Eve] might be able to carry out the mechanical duties of a mother, under supervision, she is incapable of being a mother in any other sense. Apart from being able to recognize the fact of a family unit, she would have no concept of the idea of marriage, or indeed, the consequential relationship between intercourse, pregnancy and birth.¹⁵⁴

The court held that, except for clinically therapeutic reasons, it had no authority or jurisdiction to authorize a surgical procedure on a mentally retarded person solely as a means of contraception.¹⁵⁵

Justice LaForest of the Canadian Supreme Court accepted this view and found that the purpose of the sterilization request was not to treat Eve's medical problems.¹⁵⁶ Rather, it was to save Eve from the trauma of the process of giving birth and to relieve her mother's anxiety of the real possibility that she would have the ultimate responsibility of caring for Eve's child.¹⁵⁷

151. Smith, *supra* note 131, at 81.

152. Smith, *supra* note 131, at 82 (citing *Re Eve*, 31 D.L.R.(4th) 1 (1987) (Can.)).

153. *Re Eve*, 31 D.L.R.(4th) at 2. Eve had expressive aphasia (a condition where the patient has no ability to communicate in outward thoughts or concepts easily perceivable).

154. *Id.*

155. *Id.*

156. *Id.*

157. Smith, *supra* note 131, at 83.

Another attempted sterilization occurred in the case of *Re K and Public Trustee*.¹⁵⁸ In this case, a petition was brought for a sterilization order because of a retarded child's "alleged phobic aversion to blood, which it was feared would seriously effect her when her menstrual period began."¹⁵⁹ Justice LaForest observed that:

The grave intrusion on a person's rights and the certain physical damage that ensued from non-therapeutic sterilization without consent, when compared to the highly questionable advantage that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of the person [I]t is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a court purports to act, let alone one in which that procedure is necessary in his or her best interest.¹⁶⁰

Thus, the court evinced its desire, and its mandate under Canadian law, to do what benefitted the incompetent.

3. England

The English House of Lords has held, in the case of *Re B*, 2 All E.R. 206 (1987) (Eng.), that principles of welfare to the retarded person "should be the first and paramount consideration" ¹⁶¹ In contrast to the Canadian court, the English court allowed contraceptive sterilization in the case of *Re B*.¹⁶² In that case, there was expert evidence adduced that it was vital that B, a seventeen year old girl with a mental age of five or six, who spoke in one or two word sentences and was additionally subject to epileptic seizures, not be permitted to become pregnant.¹⁶³ Such were the opinions of a pediatrician, a social worker and a gynecologist.¹⁶⁴ Because of the virtual impossibility of oral contraception, sterilization was

158. *Re K and Public Trustee*, 31 D.L.R.(4th) 22 (1985) (Can.).

159. *Id.*

160. *Id.*

161. Smith, *supra* note 131, at 84-85 (citing *Re B*, 2 All E.R. 206, 213 (1987) (Eng.)).

162. Smith, *supra* note 131, at 84-85.

163. *Id.*

164. *Id.*

the only effective means, outside of institutionalization, that could prevent problems attendant with motherhood for the girl.¹⁶⁵

Lord Bridge of Harwich stressed that the case had nothing to do with eugenic theories "or with any attempt to lighten the burden which must fall on those who have the care of the ward. It is concerned, and concerned only, with the question of what will promote the welfare and serve the best interests of the ward."¹⁶⁶ Thus, although providing a more "sophisticated, compassionate and contemporary attitude"¹⁶⁷ than the Canadian court, which presented "artificial distinctions that . . . present[ed] the issue in black and white,"¹⁶⁸ the English court stressed that sterilization could be ordered, provided its ultimate aim was to effect the best interests of the mentally retarded person.¹⁶⁹

V. U.S. SANCTIONS AGAINST CHINA'S POPULATION CONTROL ACTIVITIES

Because of Western views regarding humane treatment of the mentally retarded, China's implementation of its one-child policy and unofficial forced sterilization policy has led to considerable debate in the United States over the extent of coercion used or condoned by the PRC government in carrying out its population objectives.¹⁷⁰

Indications are that the PRC government, since its resources are scarce, relies heavily on local officials to enforce its policies.¹⁷¹ Incidents of forced sterilizations and coerced abortions have been reported,¹⁷²

165. *Id.*

166. *Id.*

167. *Id.* at 86.

168. *Id.*

169. *See id.*

170. Note, *The Chinese Population Policy*, *supra* note 11, at 345.

171. *Id.* at 346; *See also Population Minister Defends*, *supra* note 26, at 6. Peng Peiyun, Minister of the State Family Planning Commission, described the local process. Local officials create a "general mood" favoring abortion in their communities and bring pressure to bear to "mobilize" the woman. "If it doesn't work the first time, the woman must be mobilized a few more times. It may take dozens of times at persuasion for some." They say to the woman "I talk reason with you. I clearly reason with you. If you aren't convinced, then we'll have a few more ideological work sessions." "If she was not willing to do it originally, she will do it in the end after giving it some thought. This is all right, and it is no good to insist on calling this coercion or commandism," Minister Peng said. *Id.*

172. BUTTERFIELD, *supra* note 11, at 391; *U.S. Rules Out Funds for Red China's*

although they are not part of the official policy.¹⁷³ A United States Department of State Report has attributed coercive abortions to overzealous "regional practices that greatly exceed official policy."¹⁷⁴ Some reports also indicate that prohibitions against coercion have been strengthened.¹⁷⁵

Nevertheless, the Beijing regime continues to remain suspect.¹⁷⁶ In recent years, the United States has withheld contributions to the United Nations Fund for Population Activities (UNFPA)¹⁷⁷ on the ground that mainland China is one of the fund's recipients.¹⁷⁸ A State Department official, explaining the United States' position on human rights violations in China, said that "our response is most accurately portrayed in the way we deal with the question of funding for population programs in China."¹⁷⁹ In July 1991, the U.S. Senate approved twenty million dollars for the fund, providing that no money could be used for China because it practiced coercive abortion and involuntary sterilization.¹⁸⁰ Subsequently, all funding ceased because of the UNFPA's association with China.¹⁸¹

Additionally, in the same month, the Senate passed a measure which set numerous conditions that China must meet to continue to qualify for Most Favored Nation (MFN) trade status.¹⁸² Among these measures was

Sterilization Program, Cent. News Agency, Aug. 16, 1991, available in LEXIS, News Library, CENEWS File. [hereinafter *U.S. Rules Out Funds*].

173. Clarke, *supra* note 11, at 347.

174. *Id.* at 348 n.173.

175. Green, *supra* note 28, at col. 1.

176. *U.S. Rules Out Funds*, *supra* note 172. According to the report, "the United States showed disapproval of Communist China's forced sterilization program, but came short of blaming the Beijing regime for the practice". *Id.*

177. Private organizations that provide population funds to China have sued the UNFPA to enjoin the Administrator from withholding funds, but the deprivation has been legally upheld. See *Population Institute v. McPherson*, 797 F.2d 1062 (D.C. Cir. 1986).

178. The UNFPA has been put in a bind. U.S. suspicion of the Fund's activities threatens all future funding, while China opposes the Fund's insistence that family planning should be based on voluntary decisions rather than coercion. Nicholas D. Kristof, *A U.N. Agency May Leave China Over Coercive Population Control*, N.Y. TIMES, May 15, 1993, at A1 [hereinafter *Agency May Leave*].

179. *U.S. Rules Out Funds*, *supra* note 173.

180. *U.S. Senate Approves Two-Year \$28 Billion Foreign Aid Bill*, UPI, July 26, 1991, available in LEXIS, News Library, UPI File.

181. *Agency May Leave*, *supra* note 174.

182. *U.S. Senate Passes Measure Setting Conditions for China to Maintain MFN Status*, UPI, July 23, 1991, available in LEXIS, News Library, UPI File.

the requirement that China make "significant progress" in improving human rights and abolish its program of coercive abortion and involuntary sterilization.¹⁸³

However, despite these demands, China refused to acquiesce in the area of human rights.¹⁸⁴ On a trip to China, then Secretary of State James Baker was unable to gain any commitments from the Chinese regime.¹⁸⁵ More recently, the Clinton administration has taken a year-by-year approach to reviewing the grant of China's preferential trade status, based on progress on human rights issues.¹⁸⁶

But, because of rapid advances in China's economy and its concomitant rise in value as a Western economic frontier, the U.S. threat of withdrawing MFN status has become diluted.¹⁸⁷ Although China hints that dangling of the Western trade carrot still has some leverage,¹⁸⁸ ultimately, the view taken by the Chinese government is best summed up by Population Minister Peng Peiyun: "A small number of people in the United States Congress don't understand the situation and constantly attack us. There is a type of person who attacks us with ulterior motives and it will do no good to explain things. But most people just don't understand the situation."¹⁸⁹

VI. CONCLUSION

China's overpopulation problem has led its Government to impose birth rate limitations. However, its aim to increase the quality of the population by imposing eugenic sterilization laws for the mentally retarded

183. *Id.*

184. Thomas L. Friedman, *Baker's China Trip Fails to Produce Pledge on Rights*, N.Y. TIMES, Nov. 18, 1991, at A1.

185. *Id.*

186. Steven A. Holmes, *U.S. Sets June Deadline for China to End Abuses*, N.Y. TIMES, Oct. 21, 1993, at A13.

187. *See generally id.*; *Wan Li Criticizes U.S. and British Policy Towards China*, BBC SUMMARY OF WORLD BROADCASTS, Aug. 9, 1994, available in LEXIS, News Library, CURNWS File. The U.S. grant of MFN status to China has been delinked from the subject of human rights. *Id.*

188. *China-Human Rights: Beijing Waters down Eugenics Law*, Inter Press Service, Feb. 7, 1994, available in LEXIS, News Library, INPRES File. Because of international criticism, China modified the language used in its marriage law, deleting the words "eugenic" and "sterilization." (But some feel, however, that it is simply a whitewash of Beijing's true intentions.) *Id.*

189. *Id.* *Population Minister Defends*, *supra* note 26, at 3.

is reminiscent of the politically unpopular and scientifically disproven eugenics movement. Chinese officials defend these laws as "totally different" from the racist policies pursued by Adolf Hitler.¹⁹⁰ Yet, in the face of evidence that non-hereditary factors account for most cases of mental retardation in China, and the difficulties in determining whether, in cases of hereditary retardation, the defects will be passed on, no reason for sterilizing the retarded can be advanced other than that of eliminating the ability of a vulnerable underclass to procreate.

While sterilization, in some cases, may be justified by state policies favoring the welfare of its retarded citizens, the eugenic rationale is untenable. Delicate and complex social problems require legal safeguards, not offensive solutions. Western standards for ordering the sterilization of the mentally retarded take these potential violations into account.

China continues to approach its population goals in ways that invite international criticism. Regional eugenics laws and a national law leave little, if any, room for individual choice.¹⁹¹ Not much is mentioned about a humane and dignified solution. And threats of trade sanctions or the removal of preferred trade status do little to halt the Chinese government's stamp of approval for coercive abortion and sterilization practices. Safeguards for the mentally retarded are virtually non-existent.

Chinese laws aimed at reducing the number of births of "inferior quality" while at the same time purporting to provide individual choice are simply form over substance. Claims that the United States Congress does not understand the "situation" could be no farther from the truth. Individual rights are paramount to a humane society. In the end, a "quality" population is one that cares for its citizens.

Daniel S. Gewirtz

190. *China Says New Birth Law Not Like Hitler's*, UPI, available in LEXIS, News Library, UPI File.

191. Post et al., *supra* note 76, at 37.